UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 46 | Number 4 Article 15

6-1-1968

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clearly limited its holding to wrongful death cases,[40] the same reasons would seem to exist for application of the holding in personal injury cases in which an element of damages recoverable relates to lost future earnings. But, the reasons are much more compelling in the case of wrongful death because there the damage award is primarily, if not entirely, based on loss of future earnings.

The *Brooks* decision represents a commendable effort to render "reasonable justice" in spite of many practical problems of tax computation and in the face of the prevailing line of authority. It is hoped that the decision will prompt courts which have not resolved the issue to follow suit when the issue is presented, and prompt others to revaluate their current stand.

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Damages—The Not So Blessed "Blessed Event"

"[T]he birth of a child may be something less than the 'blessed event.' . . ."[1] said a California Court of Appeals in *Custodio v. Bauer*.[2] The context out of which the case arose is not unique but the attitude of the court differed from similar cases where the courts adhered to more traditional concepts of the family structure.

Plaintiff in *Custodio* underwent a salpingectomy, a female sterilization operation,[3] after she and her husband decided to limit their family for health and economic[4] reasons. After the operation

Co., 200 F. Supp. 183 (D. Conn. 1961); Meehan v. Central R.R. Co., 181 F. Supp. 594 (S.D.N.Y. 1960).

[40] 273 F. Supp. at 632.

[1] Custodio v. Bauer, 59 Cal. Rept. 463, 475 (Ct. App. 1967).

[2] *Id.* at 475.

[3] Couples wishing to prevent conception through sterilization usually have the operation performed on the husband for the reason that a male sterilization (vasectomy) is a relatively simple procedure that can be performed with a local anesthetic in a doctor's office. A salpingectomy on the other hand is classified as major surgery and carries with it a certain risk of death, although the operation is simplified if performed immediately after child-bearing. However, recanalization, the process whereby the body naturally overcomes the effects of sterilization, occurs more frequently after a vasectomy than a salpingectomy. Because recanalization would be a valid defense to a cause of action based on negligence or malpractice when a pregnancy results after a sterilization operation, the plaintiff would have an easier time overcoming the defense in an unsuccessful salpingectomy.

[4] The apparent economic motivation of the Custodios was implicit in the court's opinion.

she became pregnant with her tenth child. Mrs. Custodio and her husband sued on the basis of negligence, malpractice, fraud and deceit, negligent misrepresentation, and breach of contract. In addition to other damages plaintiffs prayed for special damages in the sum of 50,000 dollars for the expense of rearing the child.[5] Defendants demurred, *inter alia,* on the grounds that: (1) Pregnancy, birth of child, and cost and expense of delivery and rearing are not legally cognizable; (2) breach of duty was not the proximate cause of the pregnancy. The trial court sustained the general demurrer whereupon the plaintiff appealed successfully to the court of appeals which overruled the demurrer and remanded the case for trial. This note will consider the legal problems concerning the 50,000 dollar claim for the support and rearing expenses of the unwanted child.

Courts have consistently denied recovery for the cost of rearing a child[6] on the theory that a child's birth is a "blessed event" and that the happiness derived from rearing a child far outweighs the financial liability.[7] The court in *Custodio* thought it premature to discuss such questions because the issue would become moot if the plaintiffs failed to sustain their burden of proof.[8] However, in dis-

[5] From the plaintiff's complaint: "That the birth of plaintiff's child will require of the plaintiff, additional costs and expenses to properly care for and raise the said child to the age of maturity, that said cost is estimated to be in the sum of Fifty Thousand Dollars ($50,000.00) over said period of time, which constitutes additional special damages to this plaintiff."

[6] However, several courts have avoided the issue by disposing of the case by other means, or addressing themselves to other issues. *See, e.g.,* Doerr v. Villate, 14 Ill. App. 2d 332, 220 N.E.2d 767 (1966).

[7] Consider for instance the language in Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934), where the court denied recovery to a couple who had a child after a vasectomy (motivated by concern for the wife's health), but where the child and mother survived nicely. The court said: "The purpose of the operation was to save the wife from the hazards to her life which were incident to childbirth. It was not the alleged purpose to save the expense incident to pregnancy and delivery. The wife has survived. Instead of losing his wife, the plaintiff has been blessed with the fatherhood of another child. The expenses alleged are incident to the bearing of a child, and their avoidance is remote from the avowed purpose of the operation. *As well might the plaintiff charge defendant with the cost of nurture and education of the child during its minority." Id.* at 126, 255 N.W. at 622 (emphasis added). See also Doerr v. Villate, 14 Ill. App. 2d 332, 220 N.E.2d 767 (1966); Milde v. Leigh, 75 N.D. 418, 28 N.W.2d 530 (1947); Shaheen v. Knight, 11 Pa. D. & C.2d 41 (C.P. Lycoming Co. 1957), criticized in 19 U. PITT. L. REV. 802 (1958); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

[8] Determination of principles of public policy which are claimed to render certain consequences of proved wrongful acts and omissions

cussing "criteria" for the remand of the case the court left little doubt which way it would decide the issue should the danger of mootness pass. The court noted that despite precedent denying recovery, the same precedent demonstrated that birth is not always a "blessed event." The court then stated the crux of its predispositions by saying, "With fear being echoed that Malthus was indeed right, there is some trend of change in social ethics with respect to the family establishment."[9]

Clearly there are many unwanted children born in wedlock. The ever increasing use of and demand for birth control devices evidences this fact. The truism that most couples will naturally love and care for the unwanted child does not alter the fact that it is unwanted or that they would have been happier without it.[10] These family planning motivations distinguish *Custodio* from earlier cases denying recovery for unwanted child support in which sole considerations of health motivated the sterilization.[11] In *Custodio* the plaintiffs apparently wished to limit the family for economic reasons as well.[12] It may be argued that the damages should be commensurate with the injuries anticipated. Thus if a couple has a sterilization operation for reasons of health and due to the doctor's malpractice the woman bears another child which injures or kills her, a right of action is maintainable against the doctor.[13] Sim-

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noncompensable may best await the proof of the elements of damage claimed by the plaintiffs. The failure to prove an actionable wrong, or the failure to show injuries of the nature alleged, would render further pursuit of the subject moot.

59 Cal. Rept. at 468.

Indeed, the court took one paragraph to state the above (i.e., that it was premature to decide), and then spent four pages discussing "criteria"—or, in other words, what it would have decided if it were time to decide.

[9] 59 Cal. Rept. at 477.

[10] One commentator has said:

Moreover the fact that the parents love this child and feel responsible for its welfare once it has been born does not mean that they would not have been generally happier without it or that its birth constitutes a "blessed event" in every way. An inability to provide for and educate their previously born children as they anticipated or to maintain a higher standard of living once contemplated may be a constant source of sorrow for which the joy derived from the newest child compensates only inadequately.

113 U. PA. L. REV. 415, 435-36 n.79 (1965).

[11] *See, e.g.*, Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964).

[12] *See supra* note 4.

[13] Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967); West v. Underwood, 132 N.J.L. 325, 40 A.2d 610 (1945).

ilarly if a couple's motive is not only that of health but also of economic considerations, and the unwanted child increases the economic burden, then a right of action for child support should also be maintainable against the doctor. Ideally one should be able to contract for what one wants, and to recover for the foreseeable consequences of someone else's negligence. The shock and frustration of having an unexpected and unwanted child may have psychological repercussions on the parents. Indeed it could be said that to some extent the dignity of the human person is violated by upsetting a couple's rights to choose its family's size.[14] It follows that relieving the economic burden of the unwanted child would assuage the unhappy situation which the couple sought to avoid and would have avoided but for the negligence or misrepresentation of the doctor. Yet an eventual decision allowing such recovery for unwanted child support would seem to embrace more fundamental issues.[15]

Courts have long recognized that considerations other than the

[14] *Cf.* 46 N.C.L. REV. 205, 208-212 (1967).

[15] One "fundamental issue," however, seems to be well settled—that voluntary sterilization is not against public policy. Indeed *compulsory* sterilization was held to be constitutional for mentally deficient persons in Buck v. Bell, 274 U.S. 200 (1927); *but cf.* Skinner v. Oklahoma, 316 U.S. 535 (1942). In one of the earliest cases resembling *Custodio,* Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934), the court decided that such operations were not against public policy, and the courts have consistently held this position where the legislature has not held to the contrary. Two states have afforded statutory protection for doctors performing voluntary sterilization operations. *See* N.C. GEN. STAT. §§ 90-271 to -75 (Supp. 1967); VA. CODE ANN. §§ 32-423 to -26. *See also* a proposed statutory code in 113 U. PA. L. REV. 415, 442-43 (1965). Only in those states where there is a legislative restriction on sterilization (*see* CONN. GEN. STAT. REV. § 53-33 (1958); UTAH CODE ANN. § 64-10 to -12 (1961)) would the courts be unwilling to allow recovery. While these statutory restrictions may have constitutional problems in light of Griswold v. Connecticut, 381 U.S. 479 (1965), these states could still deny recovery in a tort or contract suit arising out of a sterilization operation even though they could not constitutionally prohibit the act itself. (For an argument that voluntary sterilization should be against public policy even in the absence of statutory dictates, see Smith, *Antecedent Grounds of Liability in the Practice of Surgery,* 14 ROCKY MT. L. REV. 233, 278 (1942)). But judicial acceptance of voluntary sterilization does not solve the problem of recovery. "It is submitted . . . that acceptance of sterilization and whether or not damages should be awarded for the birth of a child following such an operation are entirely different questions and different policy considerations underlie each." 9 UTAH L. REV. 808, 810 n.6 (1965). Acquiescence by the courts in one method of birth control is quite a different thing from judicially stamping a human as unwanted.

standard of living affect the well-being of the child.[16] One such consideration in unwanted child support cases is that either by necessity or accident the child may become aware of the litigation and develop into an "emotional bastard."[17] Of course the child, especially as he grows older, may by conjecture develop suspicions that he was unwanted. However, a child is less likely to become an "emotional bastard" when he may have some vague notion that his parents' family planing scheme went astray, than when he discovers that he is a 50,000 dollar judicially declared burden.[18] This being the case, would the 50,000 dollar demanded by Custodio compensate for the mental anguish the child may suffer upon making the discovery? If not, should a married couple be allowed to claim that their child is unwanted?[19]

Even if it would be permissible to claim that the child is unwanted, a recovery for support of the unwanted child presents some interesting contrasts when juxtaposed with the measure of damages in wrongful death actions. When a parent sues for the wrongful death of a child, the damages are computed by subtracting the cost of his support from the value of the enjoyment, affection and services that would have been derived from the child had he lived. Recovery is possible because the courts have assumed that the latter is a greater sum than the former.[20] If the latter figure becomes less when the child is unwanted, it may be argued that a couple who re-

[16] Most notably, of course, the rights of the natural parents. *See, e.g.*, State *ex rel.* Nelson v. Whaley, 246 Minn. 535, 75 N.W.2d 786 (1956).

[17] For a well stated argument for this position, see 9 UTAH L. REV. 808, 811-12 (1965).

[18] The *Custodio* court, however, did not make this distinction. The court dismissed the "emotional bastard" argument by saying:

> The emotional injury to the child can be no greater than that to be found in many families where "planned parenthood" has not followed the blueprint. . . . One cannot categorically say whether the tenth arrival in the Custodio family will be more emotionally upset if he arrives in an environment where each of the other members of the family must contribute to his support, or whether he will have a happier and more well-adjusted life if he brings with him the wherewithal to make it possible.

59 Cal. Rept. at 477.

[19] Thus, just as a married couple may not normally testify to non-access in order to show the illegitimacy of their child, it might be argued that the plaintiffs . . . should not be allowed to claim . . . that a child born of their marriage was unwanted, burdensome, and caused by a doctor's negligence or breach of warranty.

9 UTAH L. REV. 808, 813 (1965).

[20] *See, e.g.* Thompson v. Town of Ft. Branch, 204 Ind. 152, 178 N.E. 440 (1931).

covered for the support of an unwanted child should not be allowed to recover for the wrongful death of the same child, or at least should not be permitted to claim more than nominal damages. In addition, if a child is only slightly unwanted it is possible that the two figures may be equal and the couple would be unable to claim damages in either unwanted child support or wrongful death as each off-sets the other. Indeed, would not judicial acceptance of the proposition that the life of a child may sometimes be more a burden than a blessing require investigation into every wrongful death action to discover whether it was truly a tragic event or the happy relief of an unwanted burden? Should a couple suing for wrongful death of their child be forced to go through the agonizing and preposterous proof that they loved the child more than the going rate in unwanted child support actions? Or for that matter should the courts tolerate couples in unwanted child support cases attempting to prove how little they love the child in order to maximize the recovery? More is involved than a mere legal anomaly. The contradiction between recovery in wrongful death and unwanted child support embraces two irreconcilable concepts of the dignity and value of human life.

These concepts highlight the question of whether the courts should venture into this delicate area of family structure. Judicial cognizance of the fact that a child is unwanted, however well qualified and limited, could cause a subtle weakening in the family structure by lay misinterpretation of the purpose and meaning of the court's opinion. In short, the issue may be too subjective[21] to be handled properly by even the most adept court. As expressed by one writer: "There are some wrongs which must be suffered and the law cannot provide a remedy for them. To attempt to do so may do more social damage than if the law leaves them alone."[22]

But regardless of whether the "Blessed Eventors" or the "Non-Blessed Eventors" win the debate, courts should treat this type of recovery as *sui generis*. Decisions and considerations concerning certain analogous topics such as "wrongful life" should have only limited bearing. The "wrongful life" cases involve a suit by an

[21] Even the prerequisite decision that voluntary sterilization is not against public policy (*see* note 15, *supra*) would not be accepted by a large number of people. Many religions, especially Roman Catholic, take the position that sterilization for any purpose is against the natural law and morally wrong. *See* 31 N.Y.U.L. REV. 1170, 1181-82 (1956).

[22] Ploscowe, *An Action for "Wrongful Life,"* 38 N.Y.U.L. REV. 1078, 1080 (1963).

illegitimate against those responsible for his birth for the recovery of damages inflicted by the fact of being illegitimate (e.g., suit by the bastard son against his father).[23] The court in *Custodio* tended to commingle the "wrongful life" cases. As the court said: "The ramifications of this case also embrace the subject of 'wrongful life.' "[24] The defendant also raised the issue of "wrongful life" on petition for rehearing, arguing that the "wrongful life" cases, which generally have been unsuccessful, established that the fact of life itself could not be a ground for recovery. Yet the principles and policies involved in "wrongful life" and unwanted child support have more differences than similarities. The desired deterrent effect[25] in "wrongful life" actions (i.e., curbing extramarital sexual activity[26] or lessening carelessness on the part of guardians of *non sui juris* women[27]) is quite different from that in unwanted child support (i.e., discouraging doctors from being negligent in performing sterilization operations). Moreover a court that disallows recovery in unwanted child support because of the fear that the child may become an "emotional bastard" or that such a recovery would be disruptive of the family structure would not be inconsistent in allowing "wrongful life" recovery to a real bastard who obviously knows

[23] The term "wrongful life" was coined by the court in Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied,* 379 U.S. 945 (1964). In *Zepeda,* a bastard son sued his father for damages received by the stigma of going through life as an illegitimate. The court, while acknowledging a wrong, refused recovery because the ramifications of the decision would be so far reaching that such an innovation, it was felt by the court, should be pursued by the legislature. However, in Williams v. State, 46 Misc. 2824, 260 N.Y.S.2d 953 (Ct. Cl. 1965) the New York court did not exercise such judicial restraint. In that case there was a suit by a bastard child against a state-run mental hospital for negligence in allowing an inmate to rape the child's mother. However, this decision was later reversed in a pithy two-paragraph opinion, 269 N.Y.S.2d 786 (1966). For extensive comment on these cases see 28 ALBANY L. REV. 174 (1964); 49 IOWA L. REV. 1005 (1964); 38 N.Y.U.L. REV. 1078 (1963); 25 OHIO ST. L.J. 145 (1964); 18 STAN. L. REV. 530 (1966); 112 U. PA. L. REV. 780 (1964).

[24] 59 Cal. Rept. at 476 n.11 (1967).

[25] *See* W. PROSSER, TORTS 23 (3d ed. 1964).

[26] It is questionable whether one who gives into his lusts in spite of possible claims of child support in paternity suits, theological condemnation, social stigma, personal frustration and guilt, possible criminal penalties, and the danger of venereal disease, is likely to be deterred because of a possible "wrongful life" action.

[27] Mental institutions could probably not avoid such incidents as occurred in *Williams* without interfering with the vital group therapy treatment. The likely result, if suits multiplied, would be the dispensing of birth control pills to the female inmates.

that he was unwanted and who was never a part of a traditional "family structure." Nonetheless it seems more likely that a court will grant recovery in unwanted child support while denying it in "wrongful life." This is because unwanted child support does not entail the crippling problem present in "wrongful life" actions.

The difficulty of granting recovery in "wrongful life" is an internal paradox peculiar to the action. It is *not* a situation where the child would have been legitimate but for the actions of defendant which made him illegitimate, but rather the child is illegitimate where but for the actions of the defendant he would not have been at all. The defendant, however wrong or negligent he may have been, did bestow the gift of life upon the child.[28] Unless the illegitimate child is a thanatomaniac he has no cause to complain.[29] The situation in *Custodio* is quite different. Here the plaintiff is not questioning the value of his own life but that of another person to whom he has legal and moral responsibilities. One can not be burdened with one's own existence but one can be burdened with someone else's existence. Recovery should be denied in "wrongful life" because the value of a person's life to himself is almost infinite (limited only by the concept of an afterlife), while the disadvantages of life whether they be illegitimacy, poverty, or physical or mental[30] deformity are always somewhat less than infinite, and thus there can never be any net damage.[31] But the value of someone's else's life

[28] As one writer summarized, referring to the *Williams* case:

> She, as the genetic product of a particular man and woman, both institutionalized for mental care, either had to be born illegitimate or not at all. When a court recognizes a cause of action under these circumstances, is it acknowledging no life as the preferred alternative? If so, is it also giving its approval to abortion in cases where the disadvantages of being born are thought by the court to outweigh the advantages? . . . . Or is the court adhering to traditional views that life under any circumstances is a positive benefit, but that the bastard nevertheless should recover damages for purposes of deterring the defendant's conduct?

18 STAN. L. REV. 530, 533 (1966).

[29] *Cf.* RESTATEMENT OF TORTS § 920 (1939).

[30] Anyone who was ever moved by John Steinbeck's OF MICE AND MEN would testify to the dignity of life, however retarded in intelligence.

[31] The New York court in reversing the *Williams* decision (*see* note 23 *supra*) took a somewhat different tack, saying that the damages, if any, would be impossible to measure:

> In essence, and regardless of the verbiage of the claim above quoted, the damages asserted rest upon the very fact of conception and would have to comprehend the infirmities inherent in claimant's situation as against the alternative of a void, if nonbirth and nonexistence may be

is not limitless to another person.[32] The burdens which the other person imposes may well outweigh the benefits he might bestow.[33]

It does not necessarily follow from the above that recovery should be allowed in *Custodio*. It is merely to stress that the difficult ironies in the "wrongful life" cases are not present in this case. It is for this reason that the court would do well to keep the "wrongful life" cases on the periphery of the decision making process. Recovery in *Custodio* and other unwanted child support cases would not be internally paradoxical. Recovery would depend on whether, in judicial opinion, the subjective fear of undermining family life and psychologically harming the child is outweighed by the objective financial damage to the plaintiff. It is this question that the court must consider if it receives the case again on appeal.

RICHARD J. BRYAN

Domestic Relations—Custody—Evidence—Has the Polar Star Been Obscured by Statute in North Carolina?

"[T]he welfare of the child is the polar star by which the discretion of the court is to be guided. . . ." This oft quoted[2] phrase appears to be the guiding precept for the North Carolina courts in custody cases except where it collides with the conflicting policy of judicial economy.[3]

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expressed; and could not, without incursion into the metaphysical, be measured against the hypothesis of a child or imagined entity in some way identifiable with claimant but of normal and lawful parentage and possessed of normal or average advantages.

269 N.Y.S.2d 786, 787 (1966).

[32] To use an extreme example: The value of the life of someone attacking an innocent victim with a knife would be *de minimis* from the viewpoint of the innocent victim.

[33] One commentary glossed over this distinction. Referring to Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964), an unwanted child support case, and *Zepeda*, the writer said:

> In both . . . the claim is essentially that life could be damaging. Viewed in this light, the claims seem contrary to a concept, fundamental to our legal system, that life is inherently valuable. The practical importance of all ramifications of this concept may be doubted in view of the current population explosion. However, it is only realistic to consider that it would seem extraordinary for a court to declare that life under any adverse condition or to any person could be damaging.

9 UTAH L. REV. 808, 814 n.37 (1965).

[1] *In re* Lewis, 88 N.C. 31, 34 (1883).

[2] R. LEE, NORTH CAROLINA FAMILY LAW § 224 (1963).

[3] "Should we accept the contentions of the defendant and forbid the use